

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

HILLSBOROUGH, SS.-NORTH

JUNE TERM, 2007

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

NO. 07-S-0254

**Motion to Bar The Death Penalty (No. 1): The Death Penalty Violates the “Cruel or Unusual Punishments” Clause of Part I, Article 33 of the New Hampshire Constitution, and the “True Design of All Punishments” Clause of Part I, Article 18**

In 1980, the Massachusetts Supreme Judicial Court held that capital punishment violated Article 26 of the Massachusetts Declaration of Rights, the Commonwealth’s “cruel or unusual punishments” clause. District Attorney v. Watson, 411 N.E.2d 1274 (Mass. 1980). Michael Addison asks this Court to make the same ruling under the identically-worded Part I, Article 33 of the New Hampshire Constitution, and either dismiss the capital murder indictment, or bar the imposition of the death penalty. The Massachusetts Supreme Judicial Court’s opinion is persuasive because Article 26 is identical to Part I, Article 33, and the New Hampshire Supreme Court looks to Massachusetts decisions in construing similar provisions of the New Hampshire Constitution. Moreover, the reasoning behind the Massachusetts opinion – that the death penalty offends contemporary standards of decency – holds even more true today than in 1980.

Finally, Mr. Addison’s standing under New Hampshire law is superior in two respects. First, New Hampshire has a long-standing tradition of affording greater protection to individual liberties under its state constitution, and capital punishment is inconsistent with that tradition.

Second, New Hampshire's Constitution has the "true design of all punishments" clause, which commands that punishments "reform" instead of "exterminate." This provision, which has no analog in the Massachusetts Declaration of Rights, bars the death penalty as a punishment in contemporary society.

Mr. Addison relies on part I, articles 18 & 33 of the New Hampshire Constitution. He will separately pursue a number of other challenges to the death penalty under both of these provisions, as well as the federal constitution.

As grounds, Mr. Addison states:

1. He is charged with the capital murder of Manchester Police Officer Michael Briggs. The State has filed a notice of its intent to seek the death penalty.
2. No New Hampshire court has ruled on the facial constitutionality of the death penalty. Because the death penalty violates part I, articles 18 & 33 of the state constitution, this Court must dismiss the capital murder indictment insofar as the State seeks to execute Mr. Addison if he is convicted.

#### Part I, Article 33 and Guides to Its Interpretation

3. Part I, article 33 states that "[n]o magistrate, or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." (Emphasis added). This provision was adopted in 1784, and it has not been amended.

4. The New Hampshire Supreme Court has set forth general principles that govern the construction of provisions of the state constitution.

"Reviewing the history of the constitution and its amendments is often instructive, and in so doing, it is the duty of the court to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in light of the surrounding

circumstances.” Warburton v. Thomas, 136 N.H. 383, 387 (1992)(quotation omitted). “[T]he language used . . . by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and laws were adopted.” Opinion of the Justices, 121 N.H. 480, 483 (1981).

N.H. Motor Transport Association v. State, 150 N.H. 762, 765 (2004).

5. The Court has not considered whether the death penalty is a “cruel or unusual punishment[ ]” under part I, article 33. Normally, when the Court has been asked to evaluate whether a given punishment is “cruel or unusual,” it has evaluated only part I, article 18. See, e.g., Duquette v. Warden, No. 2006-079 (N.H. January 19, 2007)(holding consecutive sentences do not constitute cruel or unusual punishment under part I, article 18); State v. Farrow, 118 N.H. 296, 302-305 (1978)(upholding life without parole sentence for first degree murder against challenges under Eighth Amendment and part I, article 18); State v. Dean, 115 N.H. 520, 524 (1975)(holding motor vehicle habitual offender law does not violate part I, article 18).

6. Jurisprudence under part I, article 33, independent of part I, article 18, is scant. The Court has held that the “excessive fines” clause of part I, article 33 “provides at least as much protection . . . as does the Eighth Amendment.” State v. Enderson, 148 N.H. 252, 258 (2002). Based on the use of the phrase “cruel or unusual punishments,” however, part I, article 33 is textually broader than the Eighth Amendment. Some other courts have read increased protection into their state constitutional provisions based on the framers’ use of the disjunctive “cruel or unusual” in the state constitution, as opposed to the conjunctive “cruel and unusual” in the Eighth Amendment. See, e.g., James R. Acker & Elizabeth R. Walsh, Challenging the Death Penalty Under State Constitutions, 42 Vand. L.Rev. 1299, 1322 (1989)(“These disputes illustrate the point that differently worded provisions may at least provide a logical point of departure in

the quest to have different interpretations placed upon the state and federal constitutions.”); Harmelin v. Michigan, 501 U.S. 957, 983 (1991)(noting that “cruel or unusual” is more expansive than language in federal constitution); State v. Carmony, 127 Cal. App. 4<sup>th</sup> 1066 (Cal. App. 3 Dist. 2005)(holding California Constitution more protective based on use of “or”); People v. Bullock, 485 N.W.2d 866, 872 n. 11 (Mich. 1992)(“The set of punishments which are either “cruel” or “unusual” would seem necessarily broader than the set of punishments which are both “cruel” and “unusual.”)(Emphasis added). But see State v. Davis, 79 P.3d 64, 68 (Ariz. 2003)(acknowledging, but rejecting, Bullock); Thomas v. State, 634 A.2d 1, 10 n.5 (Md. 1993)(same).

7. For the reasons that follow, Mr. Addison asks this Court to hold that the death penalty is unconstitutional under part I, article 33.

8. “The words of [part I, article 33] are the same as Article XXVI of Part 1 of the 1780 Massachusetts Constitution.” Susan E. Marshall, The New Hampshire State Constitution: A Reference Guide, p. 97 (Praeger 2004). Because Massachusetts was the only colony that had a constitution in 1784, “[t]he text of the 1784 constitution was primarily based on the Massachusetts Constitution of 1780.” Id. at 1.

9. Our Supreme Court has frequently relied on the Massachusetts Supreme Judicial Court’s construction of constitutional provisions that parallel those of the New Hampshire Constitution. For example, in State v. Roache, 148 N.H. 45 (2002), the Supreme Court considered whether the police’s failure to inform a suspect in custody that an attorney was attempting to contact him violates the suspect’s part I, article 15 right to counsel. 148 N.H. at 49. In deciding that it did, the Court found particularly persuasive the Supreme Judicial Court’s

interpretation of Article 12, which was the model for part I, article 15. Id. (“Given that the language of the privilege is identical, and given the shared history of our state constitutions, we give weight to the Massachusetts Supreme Judicial Court’s interpretation of Part I, Article 12 when assessing Part I, Article 15 of the New Hampshire Constitution.”).

10. In Opinion of the Justices (Tax Plan Referendum), 143 N.H. 429 (1999), the Court had to determine whether part I, article 28, which is nearly identical to part I, article 23 of the Massachusetts Declaration of Rights, reserved a right in the people to vote on taxation legislation. 143 N.H. at 437. After setting forth the text of the Massachusetts provision, the Court reviewed a decision of the Supreme Judicial Court that construed the provision and held that the Framers did not intend that legislation be submitted to the populace for vote. Id. at 438-39. Our Court reached the same conclusion under the New Hampshire Constitution. Id. at 440-41 (“We are unable to conclude that the phrase, “the consent of the people” in Part I, Article 28 was intended to establish a right to the people of this state to directly vote on general tax legislation.”).

11. The New Hampshire Supreme Court has deemed persuasive the Supreme Judicial Court’s construction of the Massachusetts Declaration of Rights on a number of other occasions. See Sirrell v. State, 146 N.H. 364, 390 (2001)(“We recognize that Massachusetts is an exception to our general caution not to look to other jurisdictions in interpreting our Constitution.”); Claremont School District v. Governor, 138 N.H. 183, 186 (1993)(“Given that New Hampshire shares its early history with Massachusetts, that we modeled much of our constitution on the one adopted by Massachusetts four years earlier, and that the Massachusetts Constitution contains a nearly identical provision [to part II, article 83] regarding education, we give weight to the

interpretation given that provision by the Supreme Judicial Court. . . .”); Opinion of the Justices, 103 N.H. 402, 408 (1961)(looking to Massachusetts decision construing provision similar to part II, article 44 of the New Hampshire Constitution); Orr v. Quimby, 54 N.H. 590 (1874)(noting, in dissent, that New Hampshire Bill of Rights was largely copied from Massachusetts).

12. Reliance on Massachusetts precedent is appropriate not only based on the similarity in language between Article 26 and Article 33, but the similar history of the death penalty in each state.

13. The first four New Hampshire towns (Portsmouth, Dover, Hampton, Exeter), which were part of the Massachusetts Bay Colony, fell under the aegis of the capital punishment law promulgated by the Massachusetts General Court in 1641. Quentin Blaine, “Shall Surely Be Put To Death:” Capital Punishment in New Hampshire, 1623-1985, 27 N.H.B.J. 131, 132 (Spring 1986)(“Blaine”). When New Hampshire separated in 1679, it promulgated a criminal code that was based on Massachusetts law. Id. at 133.

14. Abolition movements in each place had the effect of narrowing the application of the death penalty. In 1812, the New Hampshire legislature abolished capital punishment for all crimes except murder and treason. Id. at 134. Massachusetts limited its death penalty to first degree murder around the same time. See Hauck, et. al., Capital Punishment Legislation in Massachusetts, 36 Harv. J. on Legis. 479, 481 (Summer 1999)(“Hauck”). Over the years, there were repeated efforts to repeal the death penalty, restrict its application, and install procedural mechanisms to govern its implementation. Blaine, 27 N.H.B.J. at 134-36; Hauck, 36 Harv. J. on Legis. at 481-82. Both jurisdictions retained the death penalty after Furman v. Georgia. Blaine, 27 N.H.B.J. at 136; Hauck, 36 Harv. J. on Legis. at 483. However, in each place, in spite of the

fact that the death penalty has been on the books for centuries, actual executions have been rare, especially in the modern era. Blaine, 27 N.H.B.J. at 142 (“Since 1869 New Hampshire has sentenced sixteen men to die and executed twelve, all for murder. . . . The most recent execution in New Hampshire was the 1939 hanging of Howard Long.”); Hauck, 36 Harv. J. on Legis. at 482 (“[T]he last execution in Massachusetts occurred in 1947.”). While Massachusetts does not have a death penalty, the last effort to reinstate it, in 1999, failed by only seven votes. Hauck, 36 Harv. J. on Legis. at 502. While New Hampshire does, only a gubernatorial veto prevented abolition during the Shaheen administration, and an effort to abolish it in the House on March 27, 2007 – despite the killing of an extremely beloved police officer – failed by only 12 votes.

15. Given the disjunctive language of the “cruel or unusual punishments” provisions in this State and the Commonwealth, and the historical parallels involving the death penalty, this Court should look to relevant Massachusetts precedent to determine whether the death penalty is constitutional under part I, article 33. See Claremont School District, 138 N.H. at 186 (“Given that New Hampshire shares its early history with Massachusetts, that we modeled much of our constitution on one adopted by Massachusetts four years earlier, and that the Massachusetts Constitution contains a nearly identical provision regarding [cruel or unusual punishment], we give weight to the interpretation given that provision by the Supreme Judicial Court. . . .”). For the reasons that follow, the death penalty is unconstitutional under part I, article 33.

District Attorney v. Watson: By an 8-1 Vote, The Supreme Judicial Court Rules that The Death Penalty Is Unconstitutional

16. In Watson, the Supreme Judicial Court considered whether the Massachusetts capital punishment statute violated the “cruel or unusual” clause in the Massachusetts constitution. The statute was similar to the one at issue in this case. In the first phase of the prosecution, the jury determined whether the defendant was factually guilty or not guilty. 411 N.E.2d at 1276. If the jury returned a guilty verdict, the same jury would weigh aggravating and mitigating factors, and determine punishment. Id. As under the New Hampshire statute, the jury had to find an aggravating circumstance as a requisite to a death sentence, but need not find a mitigating factor to impose a life sentence. Id. As in New Hampshire, there was automatic appellate review of any death sentence, which included a proportionality analysis. Id. at 1277.

17. After reviewing the history of the death penalty, and determining that a petition for declaratory relief was appropriate, id. at 1278-81, the Watson Court addressed the constitutionality of the death penalty. The Court found the death penalty unconstitutional under Article 26 in three respects.

18. First, the Court ruled that the death penalty offended contemporary standards of decency. Id. at 1281-83. “[A]rt. 26, like the Eighth Amendment, ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” Id. at 1281 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); see also, Gregg v. Georgia, 428 U.S. 153, 182 (1976)(“The Court must also ask whether [the death penalty] comports with the basic concept of human dignity at the core of the [Eighth] Amendment.”). In so doing, the Court acknowledged that Article 26, when adopted, did not prohibit capital punishment. Indeed, like New Hampshire’s Constitution, see N.H. Const. pt. I, art. 16, the Declaration of Rights specifically

mentions capital punishment. The Court also acknowledged that public opinion was not clearly fixed against capital punishment. However, the Court ruled that the constitution had to be construed in light of the passage of time. “Time works changes, brings into existence new conditions and purposes. Therefore a [constitutional] principle to be vital must be capable of wider application than the mischief which gave it birth.” Id. at 1281 (quoting Furman v. Georgia, 408 U.S. 238, 263-64 (1972)(Brennan, J., concurring)); see also, Gregg, 428 U.S. at 171 (“[T]he Clause forbidding “cruel and unusual” punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”)(quotation omitted). Regarding public opinion, the Court stated that “what our society does in actuality is a much more compelling indicator of the acceptability of the death penalty . . .,” id. at 1282, and the people of Massachusetts had not executed anyone since 1948. Id.

19. The Watson Court addressed the issue of whether the death penalty is cruel or unusual under contemporary norms. The Court concluded that it was, for three reasons. First, due to its utter finality, there is obviously no way to correct errors wrought by an imperfect and ever-changing criminal justice system. Id. at 1282. Second, the death penalty violates the fundamental right to life because “the calculated killing of a human being by the State involves, by its very nature, a denial of the executed person’s humanity.” Id. at 1283 (quoting Furman, 408 U.S. at 290). Finally, according to the Watson Court, the death penalty offends contemporary standards of decency due to its “unique and inherent capacity to inflict pain. . . . The mental agony is, simply and beyond question, a horror . . . [and] death remains as the only

punishment that may involve the conscious infliction of physical pain.”<sup>1</sup> Id. (quotation omitted).

20. In addition to finding that the death penalty violated contemporary standards of decency, the Watson Court deemed it unconstitutional because “[i]t is inevitable that the death penalty will be applied arbitrarily [and] will fall discriminatorily upon minorities, especially blacks.” Id. The Court noted that of the thousands of criminal homicides in recent decades, death was imposed in just a fraction of those cases, without any rational basis to explain the disparate treatment. Id. at 1283-84. It held that no statutory process, or language, could ultimately eliminate the role of “chance and caprice” in determining which defendants live, and which die. Id. at 1284-85. The Court also pointed to comprehensive studies finding the imposition of the death penalty not only arbitrary, but “disproportionately carried out on the poor, the Negro, and the members of unpopular groups.” Id. at 1285 (quoting “The Challenge of Crime in a Free Society, A Report by the President’s Commission on Law Enforcement and Administration of Justice,” at 143 (1967))<sup>2</sup>.

21. The Watson Court concluded its opinion as follows.

There is an impetus to respond in kind in punishing the person who has been convicted of murder, but the death penalty brutalizes the State which condemns and kills its prisoners. “Revenge is a kind of wild justice; which the more man’s nature runs to, the more ought law to weed it out.” Moreover, this brutality assumes new dimensions in its virtually random selection of those who are to be executed. “I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me.”

Id. at 1286-87 (quoting, respectively, Francis Bacon and Thomas Jefferson). It then declared the

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<sup>1</sup>Mr. Addison intends to separately address the contemporary standards argument as it applies to the method of execution, lethal injection, in a pleading that will be accompanied by evidence.

<sup>2</sup>Mr. Addison intends to address these arguments in great detail in an evidentiary motion. He refers to the Watson Court’s treatment of these issues here only to accurately summarize the opinion.

Commonwealth's death penalty statute unconstitutional under Article 26 of the Massachusetts Declaration of Rights. Id.<sup>3</sup>

22. Given the parallels between the New Hampshire and Massachusetts constitutions, their largely shared history in enforcing the death penalty, our Supreme Court's long and steady tradition of relying on Massachusetts decisions in construing parallel constitutional provisions, and the carefully drawn analysis of the nearly-unanimous Watson Court, this Court should rule that the death penalty violates the prohibition against cruel or unusual punishments in part I, article 33 of the New Hampshire Constitution, because it offends contemporary norms of decency.

Mr. Addison's Enhanced Claim to Relief Given the Passage of Time Since Watson, and the Greater Protections to Individual Liberties Afforded Under the New Hampshire Constitution

23. Since Watson, contemporary norms and practices have continued to shift against the death penalty as a sanction for criminal conduct. Moreover, other features unique to the New Hampshire Constitution, and therefore not considered by the Watson Court, lend additional strength to Mr. Addison's contention that the death penalty violates the New Hampshire Constitution. In support of his claims, Mr. Addison cites:

-The international community's rejection of capital punishment, especially in light of the growing influence of international law on domestic policy and jurisprudence;

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<sup>3</sup>After Watson, the people of the Commonwealth voted for, and the governor approved, a constitutional amendment designed to insulate the death penalty from judicial scrutiny, and reinstate the penalty. Hauck, 36 Harv. J. on Legis. at 483. The effort failed in two respects. First, the Supreme Judicial Court ruled that the legislature could not prevent appellate review of capital punishment. Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 123 (Mass. 1984) ("Nothing in the arguments for and against the amendment circulated to the voters concerned the total insulation of death penalty legislation from constitutional review."). Second, the new law had constitutional flaws similar to those examined by the Court in State v. Johnson, 134 N.H. 570, 578 (1991). 470 N.E.2d at 129. The Commonwealth has never reinstated the death penalty. Thus, in spite of the amendment, the Watson Court's assessment that the death penalty is incompatible with contemporary norms of decency has proven accurate.

-United States Supreme Court decisions that have narrowed the ability of states to execute classes of offenders;

-United States Supreme Court Justices whom, over their careers, came to regret their past tolerance of the death penalty, or acquiescence in important cases upholding the death penalty;

-The decline in the overall number of executions, including the moratorium on capital punishment presently in effect in several states, and the efforts of several states to abolish the death penalty;

-The existence in the New Hampshire Constitution of part I, article 18, which states that “[t]he true design of all punishments [is] to reform, not to exterminate mankind,” and which has no analog in the Massachusetts Declaration of Rights or the federal constitution; and

-The tradition of affording greater protection to individuals under the New Hampshire Constitution – a tradition that is inconsistent with the state-sponsored execution of a person convicted of a crime.

Mr. Addison will address these points in turn.

#### The International Community Has Rejected the Death Penalty

24. Since Watson was decided, 56 countries have abolished the death penalty for all crimes. Death Penalty Information Center, <http://www.deathpenaltyinfo.org>, reproducing statistics compiled by Amnesty International (current as of March 10, 2007). Among these countries are the closest allies and neighbors of the United States, such as Canada (abolished in 1998), Mexico (2005) and the United Kingdom (1998). Also among these countries are many that, at least objectively, seem less evolved with respect to “contemporary norms of decency”

than the United States, such as Mozambique (abolished in 1990), Namibia (1990), Senegal (2004) and Liberia (2005).

25. This trend is important not only because it establishes a consistent trend in the world's opinion of the impropriety of capital punishment, but also, because the United States Supreme Court – the most authoritative voice with regard to the legality of capital punishment – is more frequently considering international law and policy as it grapples with capital punishment issues. See Roper v. Simmons, 543 U.S. 551, 576 (2005)(citing to international covenants on human rights); Atkins v. Virginia, 536 U.S. 304, 316 (2002)(acknowledging amicus brief of European Union).

#### The Supreme Court Has Limited the Death Penalty

26. In addition, over the last twenty years, the United States Supreme Court has re-examined the propriety of the death penalty as applied to broad classes of offenders, and has, under the Eighth Amendment, forbidden the states from executing these offenders.

27. In Ford v. Wainright, 477 U.S. 399 (1986), the State of Florida had sentenced a man to death who was mentally incompetent. The Supreme Court had not had occasion to consider this issue since 1950, which was before the Eighth Amendment had been applied to the states.<sup>4</sup> Id. at 405. In Ford, the Court held that the Eighth Amendment restricted the states' ability to execute an insane prisoner. Id. at 410. As Justice Marshall wrote for the majority,

Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.

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<sup>4</sup>Before the Eighth Amendment applied to the states, the Court did not favorably address an inmate's due process claim to a judicial determination of his sanity, or a challenge to a state's procedure for ascertaining sanity, prior to execution.

Id. at 417.

28. In Atkins, the Court confronted whether the execution of a mentally retarded offender constituted cruel and unusual punishment under the Eighth Amendment. 536 U.S. at 307. Thirteen years earlier, in Penry v. Lynaugh, 492 U.S. 302 (1989), the Court held that the Eighth Amendment did not categorically bar executions under these circumstances. Writing for a 6-3 majority in Atkins, Justice Stevens noted that “[m]uch has changed since [Penry].” 536 U.S. at 314. Several states, after Penry, enacted statutes that expressly exempted the mentally retarded from the death penalty. Id. Moreover, the practice of executing such offenders had become so rare that it was “fair to say that a national consensus has developed against it.” Id. at 316. Thus, the Court, “[c]onstruing and applying the Eighth Amendment in the light of our evolving standards of decency,” concluded that the “Constitution places a substantive restriction on the State’s power to take the life of a mentally retarded offender.” Id. at 321 (quotations omitted).

29. Finally, in Roper, the Court addressed the issue of whether the Eighth Amendment permitted the execution of an offender who was between the ages of 15 and 18 at the time of his crime. The Court had twice previously addressed related issues, with mixed results. In Thompson v. Oklahoma, 487 U.S. 815 (1988), the Court ruled that “standards of decency” did not permit the execution of any offender under age 16 at the time of the crime. The next year, however, in Stanford v. Kentucky, 492 U.S. 361 (1989), the Court upheld a state’s ability to execute offenders who were between 16 and 18. Thus, in Roper, the Court revisited the issue it had decided fifteen years earlier in Stanford.

30. This time, the Court ruled that executions of juvenile offenders violated the Eighth

Amendment. Roper, 543 U.S. at 568. In support, the Court cited the fact that, by virtue of either statutory prohibition or established practice, juvenile executions had become exceedingly rare. Id. at 567. Moreover, studies and common experience demonstrated that juveniles were qualitatively different from adults in myriad ways that rendered them less culpable than adult offenders. Id. at 569-74. Finally, as mentioned in Paragraph 25, supra, the Court relied heavily on the clear international trend in favor of the abolition of capital punishment for juvenile offenders. Id. at 577 (“[O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.”).

#### Individual Supreme Court Justices Re-Examined the Death Penalty

31. While the Court has re-examined the propriety of capital punishment as applied to particular classes of offenders in the last twenty years, individual justices have also re-evaluated the death penalty as a sanction in any instance in light of their knowledge and experience. In Callins v. Collins, 510 U.S. 1141 (1994), Justice Blackmun, who dissented in Furman and concurred in Gregg, observed that “[t]wenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, . . . , and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.” 510 U.S. at 1144. In his dissent from the denial of a petition for writ of certiorari, Justice Blackmun continued,

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

Id. at 1145.

32. Justice Blackmun was not the only jurist during the Furman/Gregg era who changed his mind about the death penalty. “Justice Lewis Powell – who, like Justice Blackmun, was a Nixon appointee, one of the Furman dissenters, and one of the Gregg plurality, told his biographer that he regretted upholding the death penalty.” Jeffrey L. Kirchmeier, Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States, 73 U. Colo. L. Rev. 1, 28 (2002)(citing John J. Jeffries, Jr., Justice Lewis F. Powell, Jr. 451 (C. Scribner’s Sons 1994)).

Several States Have Either Halted, or Considered Halting, The Death Penalty

33. In the United States, “since the year 2000 there has been a 60% drop in death sentences, a 40% decline in executions, . . . , [and] [i]n public opinion polls, there has been an upward trend in support for life-without-parole sentences as a substitute for the death penalty.” N.H. House Crim. Justice and Safety Comm., Hearing on H.B. 1422, Testimony of Richard C. Dieter, Executive Director, Death Penalty Information Center, at 2 (January 10, 2006). In addition, according to information compiled by the Death Penalty Information Center, and available on its web site, thirteen states have either declared the death penalty unconstitutional

since 2000, imposed moratoriums on executions, or effectively halted executions.<sup>5</sup> A total of 22 states are considering, or have recently considered, abolition or moratorium bills. Neither Canada, nor any state bordering New Hampshire, has a death penalty.

34. Accordingly, since Watson was decided, nearly five dozen countries across the globe have abolished the death penalty. The Supreme Court has not only been deemed these developments relevant, but it has relied on them to re-evaluate domestic capital punishment practices, overrule settled precedent, and extend the Eighth Amendment's protection against cruel and unusual punishment to contract the reach of the death penalty. Individual justices, highly conservative in character, have come to disavow the death penalty. More and more states are executing fewer and fewer people, and introducing more legislation to abolish, or halt, the death penalty. Under these circumstances, the Watson Court's pronouncement that capital punishment offends contemporary norms of decency is, indeed, as true today as it was in 1980, if not more so.

#### The New Hampshire Constitution Strengthens Mr. Addison's Entitlement to Relief

35. For two reasons, Mr. Addison's claim, which is grounded in the New Hampshire Constitution, is stronger than was Watson's under the Massachusetts Declaration of Rights, or that of a hypothetical federal litigant. First, the New Hampshire Constitution has part I, article 18, which has no analog in the Massachusetts Declaration or federal constitution, and which

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<sup>5</sup> Illinois and New Jersey have placed a formal moratorium on executions due to general concerns about the death penalty. New York's high court has found the death penalty statute constitutionally infirm and there is pending legislation to abolish it. Nine states have effectively halted executions due to concerns regarding lethal injection, and four federal executions have been stayed based on similar concerns. Nebraska is re-examining the propriety of death by electrocution.

condemns “extermination” as a criminal punishment. Second, the New Hampshire Constitution traditionally affords greater protection to individual rights than its federal counterpart, or even the Massachusetts Declaration, in many areas. In conjunction with the Watson Court’s construction of language identical to part I, article 33, and developments since Watson demonstrating a retreat from the death penalty as a viable sanction, these additional factors give the Court more reason to rule that capital punishment offends the New Hampshire Constitution.

36. Part I, article 18 provides that

[a]ll penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.

37. While the Supreme Court has never expressly held that part I, article 18 provides greater protection than the federal constitution, it has to be so.<sup>6</sup> There is no specific proportionality clause in the federal constitution, or for that matter, in the provision of the Massachusetts Declaration of Rights on which the Watson Court relied. The Supreme Court is divided over the scope of the Eighth Amendment’s proportionality guarantee. Harmelin, 501 U.S. at 994 (principle limited to capital cases)(opinion of Scalia, J., joined by Rehnquist, C.J.); id. at 997 (applies to non-capital cases)(opinion of Kennedy, J., joined by O’Connor and Souter, JJ.). There are certainly no specific clauses cautioning against “sanguinary laws,” or in favor of

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<sup>6</sup>The Court has found that the goal of rehabilitation has “constitutional imprimatur.” State v. Evans, 127 N.H. 501, 505 (1985). Long ago, it stated, without any analysis, “[i]t is probable that this article is merely directory. . . .” State v. Foster, 80 N.H. 1, 7 (1921). Otherwise, the Court has not specifically opined as to whether part I, article 18 is more protective than the eighth amendment.

punishments that “reform, not . . . exterminate mankind.”<sup>7</sup> That the Framers of the New Hampshire Constitution chose to include this language must mean that affords greater protection than either the federal constitution, or the Massachusetts Declaration from which the New Hampshire Constitution derived, and this Court cannot ignore the language. See Kelo v. City of New London, 545 U.S. 469, 496 (2005)(“When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, that no word was unnecessarily used, or needlessly added.”)(O’Connor, J., dissenting)(quotation omitted); Claremont, 138 N.H. at 185-86 (overruling trial court’s conclusion that language of part II, article 83 was “hortatory” instead of mandatory).

38. At a minimum, the fact that the Framers included this language reflects their awareness of the need for society to constantly evaluate its punishments in light of evolving standards, and ideally, ensure that all punishments effectuate their true design: “to reform, not to exterminate mankind.” Especially in light of Watson, and trends in capital punishment since 1980, this language supports the conclusion that the death penalty, itself, should be exterminated.

39. Mr. Addison’s argument also derives support from the fact that the New Hampshire Constitution is, in general, more protective of individual rights than not only the federal constitution, but on occasion, even more so than the Massachusetts Declaration of Rights. See, e.g., Goodridge v. Department of Public Health, 798 N.E.2d 941, 948-49 (Mass. 2003) (“The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than

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<sup>7</sup>A number of states have found their constitutions more protective than the federal constitution, often based on differences in language far more subtle than that in part I, article 18. See, e.g., State v. Whitfield, 134 P.3d 1203 (Wash. App. 2006); People v. Carmony, 127 Cal. App. 4<sup>th</sup> 1066 (Cal. App. 3 Dist. 2005); State v. Pedersen, 679 N.W. 2d 368 (Minn. App. 2004); State v. Smith, 48 S.W.2d 159 (Tenn. App. 2000); Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998); People v. Bullock, 485 N.W.2d 866 (Mich. 1992); State v. Brogdon, 457 So.2d 616 (La. 1984).

the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.”).

40. With regard to due process, under part I, article 15, the Supreme Court has often afforded greater protection to individual rights than its federal counterpart. See, e.g., State v. Fleetwood, 149 N.H. 396, 405 (2003)(New Hampshire Constitution “provides greater protection to a criminal defendant with respect to confessions than does the Federal Constitution.”)(citation omitted); State v. Roache, 148 N.H. 45, 49 (2002)(“The relevant text of Part I, Article 15 [with regard to right to counsel] is broader than the Fifth Amendment.”); State v. McLellan, 146 N.H. 108, 115 (2001)(“the Due Process Clause of the New Hampshire Constitution requires proof beyond a reasonable doubt of prior convictions used to enhance a defendant’s sentence to life without parole under the provisions of RSA 632-A:10-a, III.”); State v. Laurie, 139 N.H. 325, 330 (1995)(“We hold that the New Hampshire constitutional right to present all proofs favorable affords greater protection [than the federal constitution] to a criminal defendant.”).

41. In addition, the Supreme Court has a long tradition of construing part I, article 19 to afford greater protection for individual rights than the fourth amendment. See, e.g., State v. Beauchesne, 151 N.H. 803 (2005)(Court rejects Hodari D. rule); State v. Goss, 150 N.H. 46 (2003)(Court rejects California v. Greenwood); State v. Sterndale, 139 N.H. 445 (1995)(Court rejects automobile exception); State v. Canelo, 139 N.H. 376 (1995)(Court rejects good faith exception); State v. Ball, 124 N.H. 226 (1983)(Court rejects federal plain view formulation). In at least two respects, New Hampshire has found greater protection in its constitution where Massachusetts did not. See Commonwealth v. Watson, 723 N.E.2d 501, 508 (Mass. 2000)(Court recognizes automobile exception to warrant requirement under its analog to part I, article 19);


Commonwealth v. Pratt, 555 N.E.2d 559, 567 (Mass. 1990)(Court finds no reasonable expectation of privacy in curbside trash).

Conclusion

42. The New Hampshire Constitution prohibits capital punishment. The result is demonstrated by the Massachusetts Supreme Judicial Court's construction of a clause identical to part I, article 33, and its declaration that the death penalty, in 1980, was incompatible with evolving standards of decency. It is further compelled by the continuing evolution of those standards over time, as evidenced by developments internationally, in United States Supreme Court jurisprudence, and in society at large. Finally, it is compelled by the unique protections afforded individual rights and dignity under the New Hampshire Constitution. For all of these reasons, Michael Addison asks this Court to bar the State from seeking the death penalty.

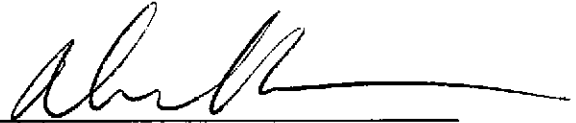
WHEREFORE, Mr. Addison respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,



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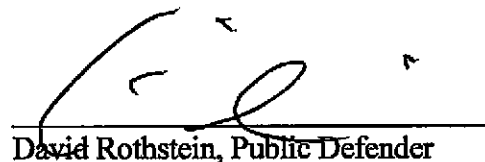
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion has been forwarded this 14<sup>th</sup> day of June, 2007, to the Office of the Attorney General.



David Rothstein, Public Defender